SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

OPPOSITION BRIEF

No. 984

UNITED CONCRETE PIPE CORPORATION, SMITH-SCOTT, INC., KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., all corporations,

Petitioners,

vs.

MARICOPA COUNTY, a body politic, et al.,

Respondents.

No. 977

OPPOSITION BRIEF

MARTIN-MARIETTA CORPORATION; and SIX POINTS LUMBER & SUPPLY COMPANY, dba O'MALLEY-GANNAWAY CONCRETE PIPE COMPANY.

Petitioners,

vs.

MARICOPA COUNTY,

Respondent.

No. 1013

AMERICAN PIPE AND CONSTRUCTION COMPANY; AMERICAN CONCRETE PIPE COMPANY; KAISER STEEL CORPORATION; SMITH-SCOTT, INCORPORATED; UNITED CONCRETE PIPE CORPORATION; UNITED STATES STEEL CORPORATION; MARTIN-MARIETTA CORPORATION; UNITED STATES INDUSTRIES, INCORPORATED; ARIZONA CONCRETE PIPE COMPANY; and SIX POINTS LUMBER & SUPPLY COMPANY, dba O'MALLEY-GANNAWAY CONCRETE PIPE COMPANY, all corporations,

Petitioners,

vs.

MARICOPA COUNTY, a body politic,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Counsel for Respondent

MOISE BERGER
Maricopa County Attorney

RONALD W. MEYER
Deputy County Attorney
101 West Jefferson
Phoenix, Arizona 85001

December 1, 1970

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CITATIONS

1. *Hardy Salt Co. v. Illinois*
(8th C.A., 1967) 377 F.2d 768 4,5,6

2. *Haseltine Research, Inc. v. Zenith Radio Corporation*
(7th C.A., 1969) 481 F.2d 21 5

3. *Leh v. General Petroleum Corporation*
(1965) 382 U.S. 54, 86 S.Ct. 206, 15 L.Ed.2d 134 3,4,5,6

4. *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*
(1965) 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 3,4,5,6

5. *New Jersey v. Morton Salt Co.*
(3rd C.A. 1967) 387 F.2d 94 4,5,6

6. *New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co.*
(3rd C.A., 1964) 332 F.2d 346 3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 904

UNITED CONCRETE PIPE CORPORATION, SMITH-SCOTT, INC., KAISER STEEL CORPORATION; UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., all corporations,

Petitioners,

vs.

MARICOPA COUNTY, a body politic, et al.,

Respondents.

No. 977

MARTIN-MARIETTA CORPORATION; and SIX POINTS LUMBER & SUPPLY COMPANY, dba O'MALLEY-GANNAWAY CONCRETE PIPE COMPANY.

Petitioners,

vs.

MARICOPA COUNTY,

Respondent.

No. 1013

AMERICAN PIPE AND CONSTRUCTION COMPANY; AMERICAN CONCRETE PIPE COMPANY; KAISER STEEL CORPORATION; SMITH-SCOTT, INCORPORATED; UNITED CONCRETE PIPE CORPORATION; UNITED STATES STEEL CORPORATION; MARTIN-MARIETTA CORPORATION; UNITED STATES INDUSTRIES, INCORPORATED; ARIZONA CONCRETE PIPE COMPANY; and SIX POINTS LUMBER & SUPPLY COMPANY, dba O'MALLEY-GANNAWAY CONCRETE PIPE COMPANY, all corporations,

Petitioners,

vs.

MARICOPA COUNTY, a body politic,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the District Court (App. A of Petition) is reported at 304 F.Supp.870. The Opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported, but is attached as Appendix B of Petition.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was the one year suspension period of Section 5b of the Clayton Act tolled until the conclusion of both government actions, criminal and civil, even though they were successive and non-contemporaneous?

2. Was the one year suspension period of Section 5b of the Clayton Act tolled as to all the defendants until the government action against the last defendant to capitulate was terminated?

3. Was the Statute of Limitations under Section 5b of the Clayton Act tolled as to Martin-Marietta Corporation and Six Points Lumber and Supply Company, dba O'Malley-Gannaway Concrete Pipe Company, by the pendency of the Federal Government Criminal and Civil Proceedings, even though they were not named as defendants or co-conspirators in the prior government proceedings?

STATUTE AND REGULATION INVOLVED

Section 5b of the Clayton Act (15 U.S.C. Section 16b) which is set forth on page 3 of the Petition.

STATEMENT

On March 10, 1964 the United States Grand Jury at Los Angeles returned five indictments against American Pipe and Construction Company, United Concrete Pipe Company, Kaiser Steel Corporation, U.S. Steel Corporation, United States Industries, and Smith-Scott, Inc., charging them with violating Section 1 of the Sherman Act, in that they submitted collusive and rigged bids for the sale of pipe and allocated and divided business among themselves. On June 19, 1964, pleas of nolo contendre were made by all defendants and judgments of guilt were entered.

On June 23, 1964, four days later, the government filed five civil actions predicated on 31 U.S.C. Section 231-233 (False Claims Act) and 15 U.S.C. Section 15a (Clayton Act 4a) in the United States District Court at Los Angeles against these same defendant corporations. On October 28, 1964 the government amended each of the complaints by adding an additional count under 15 U.S.C. Section 4, seeking to restrain continuing violations of Section 1 of the Sherman Act. A second amended complaint was filed December 2, 1967. On December 6, 1967, each of the defendants except American Pipe and Construction Company consented to a "Partial Final Judgment" and such judgment was entered against each of them. On May 24, 1968 a "Final Judgment" was entered against American Concrete Pipe and Construction Company.

On April 15, 1969 Maricopa County filed a complaint against American, United, Kaiser, U.S. Steel, U.S.I., Smith-Scott, American Concrete Pipe Company, and Martin-Marietta Corporation, alleging violations of Sec-

tion 1 of the Sherman Act. The allegations in Maricopa County's complaint were very similar to the violations alleged in the government complaint. The alleged conspiratorial acts of Martin-Marietta and O'Malley-Gannaway are fundamentally the same as those of the defendants named in the government actions. On May 22, 1969 Maricopa County amended its complaint to include Arizona Concrete Pipe Company and Six Points Lumber and Supply Company, dba O'Malley-Gannaway Concrete Pipe Company as defendants and added an allegation of a Section 2 Sherman Act violation.

The defendants filed a Motion to Dismiss and/or for Summary Judgment against Maricopa County, maintaining that its action was barred by the Statute of Limitations. The Honorable Judge Pence denied the Motions. Pursuant to 28 U.S.C. Section 1292b, the Order was certified and an appeal taken to the Circuit Court of Appeals for the Ninth Circuit. On August 28, 1970 the Court of Appeals for the Ninth Circuit upheld the decision of Judge Pence.

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT

The Honorable Judge Pence realized that *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Company*, (1965) 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405, and *Leh v. General Petroleum Corporation* (1965) 382 U.S. 54, 86 S.Ct. 206, 15 L.Ed.2d, 134, set the policy behind Section 5 of the Clayton Act. These cases establish the criteria for applying Section 5 in order to enforce the broad policy of encouraging, promoting, and assisting private anti-trust litigants. The U.S. Supreme Court upheld the language of *New Jersey Wood Finishing Company v. Minnesota Mining and Manufacturing Company* (3rd. C.A. 1964) 332 F.2d 346, wherein

the Court stated on page 354 that the sole reason for Section 5 of the Clayton Act was to stimulate private anti-trust suits and aid private suitors.

Only two Circuit Courts of Appeals have ruled on two of the questions presented in this case subsequent to the U.S. Supreme Court decisions in *Leh* and *3M*. The Eighth Circuit, in *Hardy Salt Company* v. *Illinois* (8th C.A., 1967) 377 F.2d 768, Cert.Den. 389 U.S. 912 (1967) and the Third Circuit Court of Appeals in *New Jersey* v. *Morton Salt Company* (3rd C.A. 1967) 387 F.2d 94 Cert. Den. 391 U.S. 967 (1967) have both held that the language and policy in *3M* and *Leh* clearly established the rule that Section 5b of the Clayton Act tolls the statute as to those defendants involved in the government conspiracy, but were not named as defendants or, as in the *Morton Salt* case, as co-conspirators. *Hardy Salt* and *Morton Salt* likewise held that it was the Congressional intent not to start the running of the one year provision until the government proceedings terminated as to all the defendants. While the exact question of whether successive non-contemporaneous governmental proceedings tolled the one year provision of Section 5b of the Clayton Act was not decided, Judge Pence's decision continued the policy and logic of *Leh*, *3M*, *Hardy Salt* and *Morton Salt*.

Judge Pence recognised that Section 5b of the Clayton Act is no ordinary statute of limitation. The Congressional intent behind this Section was to promote litigation and to encourage the bringing of private anti-trust suits. While the statute has an element of repose, Congress deliberately weighted the law in favor of the private plaintiff, and not the anti-trust defendant. (Petition, App. A, page 15) This policy does not violate the due process clause of the U.S. Constitution.

Judge Pence's decision reflects correctly the philosophy of the U.S. Supreme Court regarding Section 5b of the Clayton Act. The Ninth Circuit Court of Appeals adhered to the doctrine of stare decisis by affirming the principles of *Leh*, *3M*, *Hardy Salt*, and *Morton Salt*. The position of Petitioners is in conflict with the controlling authority.

II

THERE IS NO CONFLICT OF DECISIONS

Only two Circuit Courts of Appeals subsequent to *Leh* and *3M* have ruled on the issues raised by the Petitioners. Both the Third Circuit Court of Appeals and the Eighth Circuit Court of Appeals, in *Hardy Salt* and *Morton Salt*, respectively, have held in favor of the position taken by Judge Pence in his decision. Judge Pence felt that the cases prior to *Leh* and *3M* are inapplicable because they did not have the benefits of the policy and directions established by those two cases.

The case of *Hazeltine Research, Inc. v. Zenith Radio Corporation*, (7th C.A., 1969) 401 F.2d 21, is currently on appeal to the United States Supreme Court. The Seventh Circuit Court of Appeals has not ruled on the issue presented by the petitioner. While Counsel for *Hazeltine* has raised the issue of whether a government proceeding suspends the running of the Statute of Limitations as to those who are named as co-conspirators, but not as defendants in the government proceeding, that issue was not before the Circuit Court of Appeals. On page 25, Note 3 of its Opinion, the Circuit Court states that this issue was not before the Court and therefore was not included in its decision. However, the Court noted that it was the law of the Seventh Circuit that the tolling provision of Section 5b of the Clayton Act operated only as to a named defendant in a government suit. This language is clear dicta. There is some doubt as to whether the U.S. Supreme Court should rule on an issue which was not properly before the Appellate Court and which violates the well established rule that an Appellate Court will not decide an issue that was not properly before a lower court.

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The Petitioners have not raised an important question of Federal law which would warrant this Court to

grant Certiorari. The U.S. Supreme Court clearly and unequivocally set the policy and scope of Section 5b of the Clayton Act in its decisions of *Leh* and *3M*. The courts subsequent to *Leh* and *3M* applied the doctrine in those cases to mean that the limitations provision of Section 5b of the Clayton Act is tolled as to those parties who were involved in the Government conspiracy but who were not named as defendants or as co-conspirators and that the one year provision doesn't commence running until the government proceedings terminate as to all the defendants. On both occasions, the decisions of the Circuit Court of Appeals were petitioned for Certiorari to the U.S. Supreme Court. In both instances, Certiorari was denied. This is an indication that the expansion and application of the U.S. Supreme Court's mandate in *Leh* and *3M* is correct. Nothing has been alleged in the Petitioners' brief which was not presented in the *Morton Salt* petition or the *Hardy Salt* petition.

The issue whether 5b of the Clayton Act tolled the Statute of Limitations as to an action for damages by a governmental entity was not presented at the District Court nor at the Circuit Court level. Therefore, it is not properly before this Court.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MOISE BERGER
Maricopa County Attorney

RONALD W. MEYER
Deputy County Attorney

December 1, 1970